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09-25-15 A10:22 IN

September 23, 2015

VIA U.S. MAIL and EMAIL - John.McMillan@dot.ca.gov

John McMillan
Office Engineer
State of California, Department of Transportation
Division of Engineering Services
1727 30th Street, MS-43
Sacramento, California 95816

Re: *Response to Stimpel-Wiebelhaus Associates Inc. bid protest of contract
award on Contract Number 01-0B3604*
Our File No. 3216-000

Dear Mr. McMillan:

I am writing on behalf of my client, Mercer-Fraser Company ("Mercer-Fraser"), to provide the substantive response that you requested to the September 4, 2015 protest filed by Stimpel-Wiebelhaus Associates, Inc. ("SWA") against the award of the above-referenced contract to Mercer-Fraser. SWA has not identified grounds on which the California Department of Transportation ("CalTrans") should reject Mercer-Fraser's bid. Accordingly, Mercer-Fraser requests that CalTrans deny the protest and award the contract to Mercer-Fraser, the lowest responsible bidder.

In its protest, SWA first claims that Mercer-Fraser did not list a subcontractor for Bid Item #45, so claims that Mercer-Fraser's bid must be rejected. SWA's argument states no legal basis for concluding that Mercer-Fraser's bid even can be rejected. Further, SWA's misrepresentation of facts, claiming that Mercer-Fraser "does not self-perform Horizontal Drilling and has no intention of self-performing" the work, is wholly unsupported. Mercer-Fraser did not list a subcontractor for Bid Item #45 because it intends to – and is required to – perform the work itself. See Pub. Cont. Code § 4106 (prime contractor must perform work over .5% for which no subcontractor is listed). SWA's baseless accusation fails to establish any basis for rejecting Mercer-Fraser's bid.

Second, SWA claims that Mercer-Fraser failed to provide certain work category codes for subcontractors. SWA makes no attempt to establish that failure to list work category codes is a material deviation requiring rejection of a bid. A bid is responsive if it promises to do what the solicitation requires. See *Valley Crest Landscape, Inc. v. City of Davis*, 41 Cal. App. 4th 1432, 1438 (1996). If a bid contains an **immaterial** deviation from what the solicitation requires, i.e. a deviation that could not have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders, then CalTrans has the discretion to waive the deviation. See *MCM Construction, Inc. v. City and County of San Francisco*, 66 Cal. App. 4th 359, 374 (1998) (finding that a public entity has discretion to waive an immaterial deviation). As one court explained:

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"A basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted. [Citations.] However, it is further well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted *if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders* or, in other words, if the variance is inconsequential. . . ."

Konica Business Machs. U.S.A., Inc. v. Regents of Univ. of Cal., 206 Cal. App. 3d 449, 454 (1988) (italics in original). Further, as the *MCM* case recognized:

It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal . . . of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.

MCM, 66 Cal. App. 4th at 370 (internal quote marks omitted). CalTrans should reject SWA's attempt to elevate a minor matter to a level supporting rejection of the lowest responsible bidder.

Mercer-Fraser's list of subcontractors and its DBE Commitment form each identifies the "portion" of work that the DBE will perform. The work category codes provide CalTrans with no additional information. Further, the work category codes can be confusing, and many DBEs do not accurately or completely identify the work category codes that they can perform. Given CalTrans' experience with the codes, and from the specific descriptions of the work required with the bids, CalTrans likely is better able than bidders or even the DBEs to accurately identify the appropriate code from a description of the work. The lack of codes gives Mercer-Fraser no advantage over any other bidder because the critical information of identifying the work that the listed DBE will perform on the project is contained in the bid.

Moreover, SWA itself failed to identify the work category codes on its DBE Commitment form for some of its DBEs. For example, for A.C. Dike, SWA identified the NAICS codes, not the work category codes. See **Exhibit A**. For Appian UDBE, it is unclear what codes SWA used because they match neither the NAICS code nor the work codes listed on the Unified Certification Program ("UCP") website for Appian. **Exhibit B** (SWA listing of Appian); **Exhibit C** (Appian UDBE printout from UCP website). To treat bidders equally, if CalTrans rejected Mercer-Fraser's bid for not identifying work category codes, it also would have to reject SWA's bid. However, because the lack of the codes did not provide either bidder with an advantage, Mercer-Fraser requests that CalTrans waive the deviations as immaterial.

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Finally, SWA argues that Mercer-Fraser inaccurately listed A.C. Dike as performing 100% of Bid Items 34, 35 and 36 because SWA claims that A.C. Dike will not supply the asphalt or trucking. SWA misunderstands the contract requirements. The Standard Specifications regarding payment for Hot Mix Asphalt state that "HMA dike is paid for as place hot mix asphalt dike of the type specified in the Bid Item List and by weight for hot mix asphalt." **Exhibit D**. Separately pricing the material and the work to place it is consistent with the Subletting and Subcontracting Fair Practices Act, which requires bidders to identify only subcontractors that will perform construction work, not material suppliers or trucking companies. See Pub. Cont. Code § 4113 (defining "subcontractor" with reference to Business and Professions Code definition of "contractor"); Bus. & Prof. Code § 7026 (defining "contractor"). Bid Items 34, 35, and 36 are "place hot mix asphalt dike," specified in linear feet, *i.e.*, the work to place the dike. See **Exhibit E** (excerpt from Mercer-Fraser bid). However, **Bid Item 31**, specified in tons, was for the hot mix asphalt to be placed, *i.e.*, the material cost (which includes the trucking cost). *Id.* Because the asphalt material and trucking are in a separate bid item, Mercer-Fraser correctly listed A.C. Dike as performing 100% of Bid Items 34, 35 and 36.

If anything, SWA's protest raises a concern about its own bid. SWA listed A.C. Dike to perform 65% of Bid Item 34, 28% of Bid Item 35, 45% of Bid Item 36, and 32% of Bid Item 37. **Exhibit F** (SWA bid excerpt). It is irrational to have one entity place 39 linear feet of Type C dike (Bid Item 34) and have another place the remaining 21 feet, or to similarly divide the other asphalt dike work. SWA likely intends to have A.C. Dike perform all of the work, which is rational, but is inconsistent with its subcontractor listing and contrary to law.

CalTrans need not address these problems with SWA's bid because it should deny the protest and award the contract to Mercer-Fraser as the lowest responsive, responsible bidder. Thank you for your consideration of these matters.

Very truly yours,

DIEPENBROCK ELKIN LLP



Jennifer L. Dauer

JLD/sa

cc: Justin Zabel (via e-mail)

Exhibit A

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION
DBE - COMMITMENT
 DES-DE-0102.100 (REV 12/2014)

CONTRACT NO: 01-0B3604
 BID AMOUNT: \$ 1,245,011.00
 BID OPENING DATE: 8/26/15
 BIDDER NAME: STIMPEL-WIEBELHAUS ASSOCIATES INC.
 DBE GOAL FROM CONTRACT %: 8

DBE PRIME CONTRACTOR CERTIFICATION: N/A TOTAL NUMBER OF ALL SUBCONTRACTS (DBE & NON-DBE) 7 TOTAL VALUE OF ALL SUBCONTRACTS (DBE & NON-DBE) 278,068.50

BID ITEM NO.	ITEM OF WORK AND DESCRIPTION OF SERVICES TO BE SUBCONTRACTED OR MATERIALS TO BE PROVIDED*	WORK CATEGORY CODES ²	NAME OF DBE ¹ (Must be certified on the date bids are opened. Include California's certification no., DBE address, and phone number. Show 2nd and lower tier subcontractors)	AMOUNT (\$)
#34	TYPE C DIKE	237310	AC DIKE CO.	351-
#35	TYPE D DIKE	237310	2788 VENTURE DR. LINCOLN, CA 95648	8164.50
#36	TYPE F DIKE	237310	*CT000219	1989-
#37	PLACE ASPHALT MISC AREA	237310	916-652-0159	7440-

Show all DBE firms being claimed for credit, regardless of tier. Attach written confirmation from each DBE shown stating that it will be participating in the contract to perform the specific work shown for the specific amount agreed to.

The names of the 1st tier DBE subcontractors and items of work must be consistent with the Subcontractor List (Pub Cont Code § 4100 et seq.).

*Each DBE prime contractor must enter its certification number and show all work to be performed by DBEs, including work performed by its own forces.

²If 100% of an item is not to be performed or furnished by the DBE, describe the exact portion of the item to be performed or furnished.

³Use Work Category Codes from the California Unified Certification Program database.

Total Claimed
Participation

\$ 11,944.50

1.9 %

The bidder acknowledges that it is committed to use the DBEs shown on this form to meet the contract goal (49 CFR 26.53).

Clayton Olds

Signature of Bidder

8/27/15

Date

530-223-6605

(Area Code) Tel. No.

CLAYTON OLDS

Person to Contact

(Please Type or Print)

ADA Notice

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Contract No. 01-0B3604

Exhibit B

STATE OF CALIFORNIA • DEPARTMENT OF TRANSPORTATION
DBE - COMMITMENT
 DES-05-0102.10D (REV 12/2014)

CONTRACT NO: 01-0B3604
 BID AMOUNT: \$ 1,245,011.00
 BID OPENING DATE: 8/26/15
 BIDDER'S NAME: STIMPEL-WIEBELHAUS ASSOCIATES INC.
 DBE GOAL FROM CONTRACT %: 8

DBE PRIME CONTRACTOR CERTIFICATION: N/A TOTAL NUMBER OF ALL SUBCONTRACTS (DBE & NON-DBE): 7 TOTAL VALUE OF ALL SUBCONTRACTS (DBE & NON-DBE): 278,068.50

BID ITEM NO	ITEM OF WORK AND DESCRIPTION OF SERVICES TO BE SUBCONTRACTED OR MATERIALS TO BE PROVIDED*	WORK CATEGORY CODES*	NAME OF DBE (Must be certified on the date bids are opened. Include Caltrans' certification no., DBE address, and phone number. Show 2nd and 3rd tier for subcontractors)	AMOUNT (\$)
#1	LEAD COMPLIANCE PLAN	070030	APPIAN UTBE SWPPP	1900-
#6	PREPARE WATER POLLUTION CONTROL PROGRAM	130200	5780 OLINDA RD EL CERRITO, CA 94833 # 38334 510-854-9402	800-

Show all DBE firms being claimed for credit, regardless of tier. Attach written confirmation from each DBE shown stating that it will be participating in the contract to perform the specific work shown for the specific amount agreed to.

The names of the 1st tier DBE subcontractors and items of work must be consistent with the Subcontractor List (Pub Cont Code § 4100 et seq.).

*Each DBE prime contractor must enter its certification number and show all work to be performed by DBEs, including work performed by its own forces.

†If 100% of an item is not to be performed or furnished by the DBE, describe the exact portion of the item to be performed or furnished.

‡Use Work Category Codes from the California United Certification Program database.

Total Claimed
Participation

\$ 2700-

1.2 %

The bidder acknowledges that it is committed to use the DBEs shown on this form to meet the contract goal (48 CFR 26.53).

Clayton Ouds
 Signature of Bidder

8/27/15 530-223-6605
 Date (Area Code) Tel. No.

CLAYTON OUDS
 Person to Contact (Please Type or Print)

ADA Notice

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Contract No. 01-0B3604

Exhibit C

[Back To Query Form](#)**Search Returned 1 Records**

Tue Sep 22 17:11:00 PDT 2015

Query Criteria

Firm/DBA Name: appian

Firm Type: DBE

Firm ID	38334
Firm/DBA Name	APPIAN UDBE SWPPPS
Address Line1	5780 OLINDA ROAD
Address Line2	
City	EL SOBRANTE
State	CA
Zip Code1	94803
Zip Code2	
Mailing Address Line1	
Mailing Address Line2	
Mailing City	
Mailing State	
Mailing Zip Code1	
Mailing Zip Code2	
Certification Type	DBE
EMail	tomkoprek@yahoo.com
Contact Name	NICOLE KOPREK
Area Code	(510)
Phone Number	375-1927
Alt Area Code	()
Alt Phone Number	
Fax Area Code	(510)
Fax Phone Number	222-0972
Agency Name	BAY AREA RAPID TRANSIT DISTRICT (BART)
Counties	01; 07; 21; 38; 41; 48;
Districts	04;
DBE NAICS	541620;

ACDBE NAICS

Work Codes	C8794 Environmental - Water Quality; C8851 Lead Compliance; C8852 SWPPP Planning;
Licenses	
Trucks	
Gender	F
Ethnicity	BLACK
Firm Type	DBE

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Exhibit D

STATE OF CALIFORNIA
DEPARTMENT OF TRANSPORTATION

STANDARD SPECIFICATIONS 2010



39 HOT MIX ASPHALT

39-1 GENERAL

39-1.01 GENERAL

39-1.01A Summary

Section 39-1 includes general specifications for producing and placing HMA by mixing aggregate and asphalt binder at a mixing plant and spreading and compacting the HMA mixture.

HMA includes one or more of the following types:

1. Type A
2. Type B
3. OGFC, including HMA-O, RHMA-O, and RHMA-O-HB
4. RHMA-G

The HMA construction process includes one or more of the following:

1. Standard
2. Method
3. QC/QA

39-1.01B Definitions

coarse aggregate: Aggregate retained on a no. 4 sieve.

fine aggregate: Aggregate passing the no. 4 sieve.

supplemental fine aggregate: Aggregate passing the no. 30 sieve, including hydrated lime, portland cement, and fines from dust collectors.

39-1.02 MATERIALS

39-1.02A Geosynthetic Pavement Interlayer

Geosynthetic pavement interlayer must comply with the specifications for pavement fabric, paving mat, paving grid, paving geocomposite grid, or geocomposite strip membrane.

39-1.02B Tack Coat

Tack coat must comply with the specifications for asphaltic emulsion or asphalts. Choose the type and grade.

Notify the Engineer if you dilute asphaltic emulsion with water. The weight ratio of added water to asphaltic emulsion must not exceed 1 to 1.

Measure added water either by weight or volume in compliance with section 9-1.02 or you may use water meters from water districts, cities, or counties. If you measure water by volume, apply a conversion factor to determine the correct weight.

With each dilution, submit:

1. Weight ratio of water to bituminous material in the original asphaltic emulsion
2. Weight of asphaltic emulsion before diluting
3. Weight of added water
4. Final dilution weight ratio of water to asphaltic emulsion

39-1.02C Asphalt Binder

Asphalt binder in HMA must comply with the specifications for asphalts or section 39-1.02D.

Asphalt binder for geosynthetic pavement interlayer must comply with the specifications for asphalts. Choose from Grades PG 64-10, PG 64-16, or PG 70-10.

SECTION 39

HOT MIX ASPHALT

The Department does not adjust the unit price for an increase or decrease in the tack coat quantity. Section 9-1.06 does not apply to tack coat.

Place hot mix asphalt dike of the type specified is measured along the completed length.

Place hot mix asphalt (miscellaneous areas) is measured as the in-place compacted area.

[HMA dike is paid for as place hot mix asphalt dike of the type specified in the Bid Item List and by weight for hot mix asphalt.

HMA specified to be placed in miscellaneous areas is paid for as place hot mix asphalt (miscellaneous area) and by weight for hot mix asphalt.

If the QC/QA construction process is specified, HMA placed in dikes and miscellaneous areas is paid for as hot mix asphalt as specified in section 39-4 except section 39-4.04B does not apply.

If minor hot mix asphalt is paid by area, it is measured from the dimensions shown.

Payment for tack coat for minor HMA is included in payment for minor hot mix asphalt or the bid item that requires minor HMA.

Geosynthetic pavement interlayer is measured for the actual pavement area covered.

If the dispute resolution independent third party determines the Department's test results are correct, the Engineer deducts the independent third party's testing costs from payments. If the independent third party determines your test results are correct, the Department pays the independent third party's testing costs.

Exhibit E

STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION

Contract No.: 01-0B3604 Project ID: 0112000120

Bidder Name: Mercer Fraser Company

Bidder ID: VC0000003985

BID ITEM LIST

Item No.	Item Code	Item Description	Estimated Quantity Unit of Measure	Unit Price	Item Total
25	029354	SELECTED MATERIAL	70.0 CY	75.00	5,250.00
26	205035	WOOD MULCH	30.0 CY	120.00	3,600.00
27	210300	HYDROMULCH	8,860.0 SQFT	0.80	7,088.00
28	210350	FIBER ROLLS	320.0 LF	8.00	2,560.00
29	210420	STRAW	8,860.0 SQFT	0.20	1,772.00
30	210430	HYDROSEED	8,860.0 SQFT	1.00	8,860.00
31	390132	HOT MIX ASPHALT (TYPE A)	760.0 TON	230.00	174,800.00
32	391006	ASPHALT BINDER (GEOSYNTHETIC PAVEMENT INTERLAYER)	0.2 TON	1,500.00	300.00
33	029355	GEOSYNTHETIC PAVEMENT INTERLAYER	190.0 SQYD	35.00	6,650.00
34	394074	PLACE HOT MIX ASPHALT DIKE (TYPE C)	60.0 LF	10.00	600.00
35	394075	PLACE HOT MIX ASPHALT DIKE (TYPE D)	370.0 LF	9.00	3,330.00
36	394077	PLACE HOT MIX ASPHALT DIKE (TYPE F)	340.0 LF	9.00	3,060.00

Exhibit F

STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION
Contract No.: 01-0B3604 Project ID: 0112000120
Bidder Name: Stimpel-Wiebelhaus Associates Inc. Bidder ID: VC0000014078
DES-OE-0102.2C (REV 03/2015)

Bidding Firm: Stimpel-Wiebelhaus Associates Inc.

List this sub? Yes

- 1) Business Name AC Dike Co
Location City Lincoln State ca
California Contractor License Number 407417
Public Works Contractor Registration Number 1000005929
Portion of Work Subcontracted:

Item #	Description
34 65	Place Type C Dike
35 28	Place Type D dike
36 45	Place Type F Dike
37 32	Place Asphalt Misc Area

List this sub? Yes

- 2) Business Name Bullseye Boring
Location City Calimesa State CA
California Contractor License Number 926356
Public Works Contractor Registration Number 1000004811
Portion of Work Subcontracted:

Item #	Description
44 52	Furnish and install drain pipe
45 66	Drill Hole-horizontal drain

List this sub? Yes

- 3) Business Name Dirt & Aggregate Interchange Inc
Location City Fairview State OR
California Contractor License Number 507828
Public Works Contractor Registration Number 1000010905
Portion of Work Subcontracted:

Item #	Description
15 100	Treated wood waste
17 100	remove guardrail
57 100	midwest guardrail system-wood post
58 100	midwest guardrail system-7' wood post
59 100	end anchor assembly-typ SFT